

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF PUERTO RICO

3 HECTOR ROSARIO, et al.,

4 Plaintiffs,

5 v.

6 CIVIL NO. 06-1517 (RLA)

7 UNITED STATES OF AMERICA,
8 et al.,

9 Defendants.

10 **ORDER IN THE MATTER OF DEFENDANTS' MOTION TO DISMISS**

11 Present before the court for disposition is defendants' Motion
12 to Dismiss the Complaint. The court having reviewed the memoranda
13 filed by the parties as well as the documents submitted therewith
14 hereby rules as follows.

15 **I. PROCEDURAL BACKGROUND**

16 This action was instituted by 22¹ federal police officers who,
17 at the time of the events alleged in the complaint, were carrying out
18 police work for the Department of Veterans Affairs (DVA) at the San
19 Juan Veterans Affairs Medical Center in Puerto Rico ("SJ-VAMC").

20
21
22

¹ Named plaintiffs are: (1) Miguel Roman, (2) Edwin Castillo,
23 (3) Antonio Falu, (4) Aladino Collazo, (5) Hector Rosario, (6) Erik
24 Diaz, (7) Arthur Planadeball, (8) Alex Caseres, (9) Iraida Lebron,
25 (10) Efrain Cruz, (11) Rafael Lopez, (12) Francisco Sanchez, (13)
Enelida Gonzalez, (14) Angel R. Medina, (15) Edel Gil Gutierrez, (16)
Marcos Giraud, (17) Benigno Carrion, (18) Jose Arroyo, (19) Rafael
26 Alvira, (20) Gustavo Ayala, (21) Alberto Santiago and (22) Eddie
Sanchez.

1 CIVIL NO. 06-1517 (RLA)

Page 2

2 Plaintiffs claim that defendants' surreptitious video
3 surveillance of their locker-break room ran afoul of the Federal Tort
4 Claims Act ("FTCA"), 28 U.S.C. §§ 2671-2680 as well as deprivation of
5 their rights to "due process of law, equal protection of the laws and
6 the pursuit of their life, liberty and profession."²
7

8 Named defendants are: the United States, the Secretary of the
9 Department of Defense, the SJ-VAMC as well as seven federal officers
10 and/or employees of the SJ-VAMC³ both in their official and individual
11 capacities. Plaintiffs voluntarily dismissed their claims against the
12 Secretary of the U.S. Department of Defense.⁴
13

II. MOTION TO DISMISS

14 In their Motion to Dismiss defendants argue that: (1) plaintiffs
15 have no actionable claim under the Fourth Amendment to the United
16 States Constitution; (2) there is no viable claim under the FTCA for
17 violation of privacy rights under the Puerto Rico Constitution; (3)
18 plaintiffs' claim for damages based on a hostile environment is not
19 actionable under the FTCA and (4) the Secretary of Defense, the SJ-
20 VAMC as well as the individual defendants are not proper party
21 defendants under the FTCA.
22

23 ² Complaint ¶ 1.

24 ³ These are: (1) Sylvia Valentin-Maldonado, (2) Roberto Alonso,
25 (3) Merido Aponte, (4) Francisco de Jesus, (5) Jorge L. Cruz Sanchez,
 (6) Janet Diaz and (7) Dr. Rafael Ramirez-Gonzalez.

26 ⁴ See Partial Judgment (docket No. 27).

1 CIVIL NO. 06-1517 (RLA)

Page 3

Upon examining the four arguments raised by defendants in their motion to dismiss, we must reach the conclusion that the first one, pertaining to the Fourth Amendment, disputes the legal validity of the illegal surveillance claim. The last three, on the other hand, address defenses under the FTCA which, in effect, challenge our subject matter jurisdiction.

In order to dispose of these issues, we must initially determine the applicable legal standard to our review.

(A) Rule 12(b)(1) Standard - Jurisdiction

The court's authority to entertain a particular controversy is commonly referred to as subject matter jurisdiction. "In the absence of jurisdiction, a court is powerless to act.") Am. Fiber & Finishing, Inc. v. Tyco Healthcare Group, LP, 362 F.3d 136, 138 (1st Cir. 2004).

Federal courts are courts of limited jurisdiction and hence, have the duty to examine their own authority to preside over the cases assigned. "It is black-letter law that a federal court has an obligation to inquire *sua sponte* into its own subject matter jurisdiction." McCulloch v. Velez, 364 F.3d 1, 5 (1st Cir. 2004). See also, Am. Fiber, 362 F.3d at 138 ("In the absence of jurisdiction, a court is powerless to act."); Bonas v. Town of North Smithfield, 265 F.3d 69, 73 (1st Cir. 2001) ("Federal courts are courts of limited jurisdiction, and therefore must be certain that they have explicit authority to decide a case").

1 CIVIL NO. 06-1517 (RLA)

Page 4

2 If jurisdiction is questioned, the party asserting it has the
3 burden of proving a right to litigate in this forum. McCulloch v.
4 Velez, 364 F.3d at 6. "Once challenged, the party invoking diversity
5 jurisdiction must prove [it] by a preponderance of the evidence."
6 Garcia Perez v. Santaella, 364 F.3d 348, 350 (1st Cir. 2004). See
7 also, Mangual v. Rotger-Sabat, 317 F.3d 45, 56 (1st Cir. 2003) (party
8 invoking federal jurisdiction has burden of establishing it).

9 Further, subject matter jurisdiction is not waivable or
10 forfeited. Rather, it involves a court's power to hear a case, it may
11 be raised at any time. Kontrick v. Ryan, 540 U.S. 443, 124 S.Ct. 906,
12 157 L.Ed.2d 867 (2004); United States v. Cotton, 535 U.S. 625, 122
13 S.Ct. 1781, 152 L.Ed.2d 860 (2002). "The objection that a federal
14 court lacks subject-matter jurisdiction... may be raised by a party,
15 or by a court on its own initiative, at any stage in the litigation,
16 even after trial and the entry of judgment." Arbaugh v. Y&H Corp.,
17 546 U.S. 500, 506, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006).

18 The proper vehicle for challenging the court's subject matter
19 jurisdiction is Rule 12(b) (1), whereas challenges to the sufficiency
20 of the complaint are examined under the strictures of Rule 12(b) (6).
21 In disposing of motions to dismiss for lack of subject matter
22 jurisdiction the court is not constrained to the allegations in the
23 pleadings as with Rule 12(b) (6) petitions. Rather, the court may
24 review extra-pleading material without transforming the petition into
25 a summary judgment vehicle. Gonzalez v. United States, 284 F.3d 281,
26

1 CIVIL NO. 06-1517 (RLA)

Page 5

2 288 (1st Cir. 2002); Aversa v. United States, 99 F.3d 1200, 1210 (1st
3 Cir. 1996).

4 Even though the court is not circumscribed to the allegations in
5 the complaint in deciding a jurisdictional issue brought pursuant to
6 Rule 12(b)(1) Fed. R. Civ. P. and that it may also take into
7 consideration "extra-pleading material", 5A Charles Allan Wright &
8 Arthur R. Miller, Federal Practice and Procedure § 1350 (2d ed. 1990)
9 p. 213, "[w]here movant has challenged the factual allegations of the
10 party invoking the district court's jurisdiction, the invoking party
11 'must submit affidavits and other relevant evidence to resolve the
12 factual dispute regarding jurisdiction.'" Johnson v. United States,
13 47 F.Supp.2d 1075, 1077 (S.D.Ind. 1999) (citing Kontos v. United
14 States Dept. of Labor, 826 F.2d 573, 576 (7th Cir. 1987)).

15 In ruling on a motion to dismiss for lack of subject
16 matter jurisdiction under Fed. R. Civ. P. 12(b)(1), the
17 district court must construe the complaint liberally,
18 treating all well-pleaded facts as true and indulging all
19 reasonable inferences in favor of the plaintiff. In
20 addition, the court may consider whatever evidence has been
21 submitted, such as the depositions and exhibits submitted
22 in the case.

23 Aversa v. United States, 99 F.3d at 1210-11 (citations omitted). See
24 also, Shrieve v. United States, 16 F.Supp.2d 853, 855 (N.D. Ohio
25

26

1 CIVIL NO. 06-1517 (RLA)

Page 6

2 1998) ("In ruling on such a motion, the district court may resolve
3 factual issues when necessary to resolve its jurisdiction.")
4

5 **(B) Rule 12(b) (6) - Failure to State a Claim
and Rule 56 - Summary Judgment**

6 In disposing of motions to dismiss pursuant to Rule 12(b) (6)
7 Fed. R. Civ. P. the court will accept all factual allegations as true
8 and will make all reasonable inferences in plaintiff's favor.
9 Campagna v. Mass. Dep't of Env't Prot., 334 F.3d 150, 154 (1st Cir.
10 2003); In re Colonial Mortgage Bankers Corp., 324 F.3d 12, 15 (1st
11 Cir. 2003); Frazier v. Fairhaven School Com., 276 F.3d 52, 56 (1st
12 Cir. 2002); Alternative Energy, Inc. v. St. Paul Fire and Marine Ins.
13 Co., 267 F.3d 30, 33 (1st Cir. 2001); Berezin v. Regency Sav. Bank,
14 234 F.3d 68, 70 (1st Cir. 2000); Tompkins v. United Healthcare of New
15 England, Inc., 203 F.3d 90, 92 (1st Cir. 2000).

16 Our scope of review under this provision is a narrow one.
17 Dismissal will only be granted if after having taken all well-pleaded
18 allegations in the complaint as true, the Court finds that plaintiff
19 is not entitled to relief under any theory. Asoc. de Educacion
20 Privada de P.R. v. Echevarria, 385 F.3d 81, 85 (1st Cir. 2004); Peña-
21 Borrero v. Estremeda, 365 F.3d 7, 11 (1st Cir. 2004); Campagna, 334
22 F.3d at 154; In re Colonial Mortgage, 324 F.3d at 15; Brown v. Hot,
23 Sexy and Safer Prods., Inc., 68 F.3d 525, 530 (1st Cir. 1995) cert.
24 denied, 116 S.Ct. 1044 (1996); Vartanian v. Monsanto Co., 14 F.3d
25 697, 700 (1st Cir. 1994). Further, our role is to examine the
26

1 CIVIL NO. 06-1517 (RLA)

2 Page 7

3 complaint to determine whether plaintiff has adduced sufficient facts
4 to state a cognizable cause of action.

5 When disposing of a motion to dismiss under Rule (12) (b) (6) the
6 court may look at matters outside the pleadings which have been
7 "fairly incorporated within it and matters susceptible to judicial
8 notice" without converting it into a summary judgment petition. In re
9 Colonial Mortgage, 324 F.3d at 15. In other words, in cases where "a
10 complaint's factual allegations are expressly linked to - and
11 admittedly dependent upon - a document (the authenticity of which is
12 not challenged), that document effectively merges into the pleadings
13 and the trial court can review it in deciding a motion to dismiss
14 under Rule 12(b)(6).'" Perry v. New England Bus. Serv., Inc., 347
15 F.3d 343, 345 n.2 (citing Beddall v. State St. Bank and Trust Co.,
16 137 F.3d 12, 17 (1st Cir. 1998)).

17 However, pursuant to Rule 12(b), regardless of how the petition
18 for dismissal is labeled, in the event that documents outside the
19 pleadings are included with the request it may be deemed a summary
20 judgment vehicle. Santiago v. Canon U.S.A., Inc., 138 F.3d 1, 4-5 (1st
21 Cir. 1998); Rodriguez v. Fullerton Tires Corp., 115 F.3d 81, 83 (1st
22 Cir. 1997); Vega-Rodriguez v. Puerto Rico Telephone Co., 110 F.3d
23 174, 177-78 (1st Cir. 1997).

24 Rule 56(c) Fed. R. Civ. P., which sets forth the standard for
25 ruling on summary judgment motions, in pertinent part provides that
26 they shall be granted "if the pleadings, depositions, answers to

1 CIVIL NO. 06-1517 (RLA)

Page 8

2 interrogatories, and admissions on file, together with the
3 affidavits, if any, show that there is no genuine issue as to any
4 material fact and that the moving party is entitled to a judgment as
5 a matter of law." Sands v. Ridefilm Corp., 212 F.3d 657, 660-61 (1st
6 Cir. 2000); Barreto-Rivera v. Medina-Vargas, 168 F.3d 42, 45 (1st Cir.
7 1999). The party seeking summary judgment must first demonstrate the
8 absence of a genuine issue of material fact in the record.
9 DeNovellis v. Shalala, 124 F.3d 298, 306 (1st Cir. 1997). A genuine
10 issue exists if there is sufficient evidence supporting the claimed
11 factual disputes to require a trial. Morris v. Gov't Dev. Bank of
12 Puerto Rico, 27 F.3d 746, 748 (1st Cir. 1994); LeBlanc v. Great Am.
13 Ins. Co., 6 F.3d 836, 841 (1st Cir. 1993), cert. denied, 511 U.S.
14 1018, 114 S.Ct. 1398, 128 L.Ed.2d 72 (1994). A fact is material if
15 it might affect the outcome of a lawsuit under the governing law.
16 Morrissey v. Boston Five Cents Sav. Bank, 54 F.3d 27, 31 (1st Cir.
17 1995).

18 In cases where the non-movant party bears the ultimate burden of
19 proof, he must present definite and competent evidence to rebut a
20 motion for summary judgment, Anderson v. Liberty Lobby, Inc., 477
21 U.S. 242, 256-257, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Navarro v.
22 Pfizer Corp., 261 F.3d 90, 94 (1st Cir. 2000); Grant's Dairy v. Comm'r
23 of Maine Dep't of Agric., 232 F.3d 8, 14 (1st Cir. 2000), and cannot
24 rely upon "conclusory allegations, improbable inferences, and
25 unsupported speculation". Lopez-Carrasquillo v. Rubianes, 230 F.3d
26

1 CIVIL NO. 06-1517 (RLA)

2 Page 9

3 409, 412 (1st Cir. 2000); Maldonado-Denis v. Castillo-Rodríguez, 23
4 F.3d 576, 581 (1st Cir. 1994); Medina-Muñoz v. R.J. Reynolds Tobacco
5 Co., 896 F.2d 5, 8 (1st Cir. 1990).

6 Any testimony used in support of a motion for summary judgment
7 setting must be admissible in evidence, i.e., based on personal
8 knowledge and otherwise not contravening evidentiary principles. Rule
9 56(e) specifically mandates that affidavits submitted in conjunction
10 with the summary judgment mechanism must "be made on personal
11 knowledge, shall set forth such facts as would be admissible in
12 evidence, and shall show affirmatively that the affiant is competent
13 to testify to the matters stated therein." Hoffman v. Applicators
14 Sales and Serv., Inc., 439 F.3d 9, 16 (1st Cir. 2006); Carmona v.
15 Toledo, 215 F.3d 124, 131 (1st Cir. 2000). See also, Quiñones v.
16 Buick, 436 F.3d 284, 290 (1st Cir. 2006) (affidavit inadmissible
17 given plaintiff's failure to cite "supporting evidence to which he
18 could testify in court"). "Evidence that is inadmissible at trial,
19 such as inadmissible hearsay, may not be considered on summary
20 judgment." Vazquez v. Lopez-Rosario, 134 F.3d 28, 33 (1st Cir. 1998).
21 In order to be admissible, the proffered statements must be specific
22 and adequately "supported with particularized factual information."
23 Perez v. Volvo Car Corp., 247 F.3d at 316. See also, Santiago-Ramos
24 v. Centennial P.R. Wireless Corp., 217 F.3d 46, 53 (1st Cir. 2000)
25 ("specific factual information based upon [affiant's] personal
26 knowledge.")

1 CIVIL NO. 06-1517 (RLA)

2 Page 10

3 Further, Rule 56(e) itself provides that "[f]acts contained in
4 a supporting or opposing statement of material facts, if supported by
5 record citations as required by this rule, shall be deemed admitted
6 unless properly controverted".

7 **(C) Standard in This Case**

8 In this case, even though the dispositive motion under our
9 consideration is entitled Motion to Dismiss and plaintiffs seek
10 dismissal of some of the claims premised on the alleged lack of
11 subject matter jurisdiction, i.e., Rule 12(b)(1), part of the
12 arguments proffered by defendants are directed instead at the
13 adequacy of plaintiffs' constitutional claim. Specifically, Part B of
14 defendants' motion addresses defendants' position that plaintiffs
15 have no viable cause of action under the Fourth Amendment.⁵ Further,
16 defendants submitted proposed uncontested facts as well as extrinsic
17 evidence in support of this particular thesis.⁶ Hence, in accordance
18 with the provisions of Rule 12(b) this portion of the petition needs
19 to be examined under the strictures of Rule 56 rather than Rule
20 12(b)(6).

21 Accordingly, we evaluate defendants' request for dismissal of
22 the Fourth Amendment claims as one for summary judgment. Defendants'
23 arguments regarding the FTCA, i.e., sovereign immunity, on the

24 _____
25 ⁵ Motion to Dismiss (docket No. 33) pp. 6-10.

26 ⁶ Motion to Dismiss (docket No. 33) pp. 1-5.

1 CIVIL NO. 06-1517 (RLA)

Page 11

2 other hand, shall be examined instead under the provisions of Rule
3 12(b) (1).

4

5 **III. FTCA - INDIVIDUAL DEFENDANTS**

6 The United States, as a sovereign, is immune from suit unless it
7 waives its immunity by consenting to be sued. See, United States v.
8 Mitchell, 463 U.S. 206, 212, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983)
9 ("It is axiomatic that the United States may not be sued without its
10 consent and that the existence of consent is a prerequisite for
11 jurisdiction."); Barrett v. United States, 462 F.3d 28, 36 (1st Cir.
12 2006) ("[t]he United States, as sovereign, cannot be sued absent an
13 express waiver of its immunity"); Day v. Mass. Air Nat'l Guard, 167
14 F.3d 678, 681 (1st Cir. 1999) ("[a]s sovereign, the United States may
15 not be sued for damages without its consent.")

16 Plaintiffs may not pursue a negligence cause of action against
17 the individual defendants in this case. The United States is the only
18 proper party defendant to a suit based on torts arising from the
19 negligent acts or omissions of its employees when taken within the
20 scope of their official duties. McCloskey v. Mueller, 446 F.3d 262,
21 266 (1st Cir. 2006). "The FTCA waives the sovereign immunity of the
22 United States with respect to tort claims... and provides the
23 exclusive remedy to compensate for a federal employee's tortious
24 acts, committed within his or her scope of employment." Roman v.
25 Townsend, 224 F.3d 24, 27 (1st Cir. 2000). Pursuant to 28 U.S.C.
26 § 2679(b) (1), the remedies provided under the Federal Tort Claims Act

1 CIVIL NO. 06-1517 (RLA)

Page 12

2 against the United States for negligent suits is exclusive and
3 federal employees are immune from suits based on torts for acts taken
4 within the scope of their employment.

5 The Federal Employees Liability Reform and Tort Compensation
6 Act of 1988, commonly known as the Westfall Act, amended the FTCA "to
7 make an action against the United States the exclusive remedy for
8 money damages for injury arising from the 'negligent or wrongful act
9 or omission' of a federal employee 'acting within the scope of his
10 office or employment,' 28 U.S.C. § 2679(b)(1) making federal
11 employees absolutely immune from suit for torts committed within the
12 scope of employment." Aversa, 99 F.3d at 1207. "The [Westfall] Act
13 confers such immunity by making an FTCA action against the Government
14 the exclusive remedy for torts committed by Government employees in
15 the scope of their employment." United States v. Smith, 499 U.S. 160,
16 163, 111 S.Ct. 1180, 113 L.Ed.2d 134 (1991).

17 This individual immunity subsists even if government liability
18 is otherwise foreclosed. Operation Rescue National v. United States,
19 147 F.3d 68, 69 (1st Cir. 1998). In other words, the FTCA provides
20 "the exclusive mode of recovery for the tort of a Government employee
21 even when the FTCA itself precludes Government liability." United
22 States v. Smith, 499 U.S. at 166. See also, Aversa, 99 F.3d at 1208
23 ("FTCA is the exclusive remedy even when... an exception to the FTCA
24 precludes government liability.").

25 Federal government agencies are also shielded from liability by
26 the FTCA. Pursuant to § 2679(a) "[t]he authority of any federal

1 CIVIL NO. 06-1517 (RLA)

Page 13

2 agency to sue and be sued in its own name shall not be construed to
 3 authorize suits against such federal agency on claims which are
 4 cognizable under [the FTCA]".

5 Accordingly, any and all negligence claims asserted against the
 6 individual defendants in this case are hereby **DISMISSED**.

7 Further, because the United States is the sole proper party
 8 defendant under the FTCA all negligence claims asserted against the
 9 Secretary of the Department of Defense as well as the SJ-VAMC are
 10 also **DISMISSED**.

11 **IV. OFFICIAL AND INDIVIDUAL CAPACITY - BIVENS**

12 Actions brought against federal government agents/employees in
 13 their "official" capacity are deemed suits against the United States
 14 which seek indemnification from the Government. "Relief in 'official
 15 capacity' suits, when granted, affects the defendant's office or
 16 position rather than his personal assets." Perez Olivo v. Gonzalez,
 17 384 F.Supp.2d 536, 543 (D.P.R. 2005).

18 On the other hand, federal officials acting under color of
 19 federal law may be individually liable for constitutional torts
 20 similar to the liability of their state counterparts under 42 U.S.C.
 21 § 1983.⁷ Bivens v. Six Unknown Named Agents of Fed. Bureau of

23 ⁷ It must be noted that claims under 42 U.S.C. § 1983 are
 24 inapposite in this type of suit inasmuch as this provision applies
 25 exclusively "to persons acting 'under color of state law' and not to
 26 persons acting pursuant to federal law." Chatman v. Hernandez, 805
 F.2d 453, 455 (1st Cir. 1986). See also, Rogers v. Vicuna, 264 F.3d
 1, 4 (1st Cir. 2001) ("§ 1983 cannot form the basis of an action
 against individuals acting under color of federal law"); Roman v.

1 CIVIL NO. 06-1517 (RLA)

14

2 Narcotics, 403 U.S. 388, 397, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971);
 3 Redondo-Borges v. U.S. Dept. of Housing and Urban Dev., 421 F.3d 1,
 4 6 (1st Cir. 2005); Santoni v. Potter, 369 F.3d 594, 598 (1st Cir.
 5 2004). “[T]he only way in which a suit for damages arising out of
 6 constitutional violations attributable to federal action may be
 7 brought is under the doctrine of *Bivens*”. Tapia-Tapia v. Potter, 322
 8 F.3d 742, 746 (1st Cir. 2003).

9 “The *Bivens* doctrine allows constitutional claims against
 10 federal officials, in their individual capacities, for actions taken
 11 under color of federal law. But the availability of that doctrine
 12 does not override bedrock principles of sovereign immunity so as to
 13 permit suits against the United States, its agencies, or federal
 14 officers sued in their official capacities.” McCloskey, 446 F.3d at
 15 271-72 (italics in original, internal citations omitted). Tapia-
16 Tapia, 322 F.3d at 745 (sovereign immunity bars claims against
 17 federal defendants in official capacity; only *Bivens* available for
 18 constitutional violations). “[T]he government’s sovereign immunity
 19 does not vanish simply because government officials may be personally
 20 liable for unconstitutional acts.” Tapia-Tapia, 322 F.3d at 746.

21 “*Bivens* suits can only be brought against federal officers in
 22 their individual capacities.” Id. at 746. “It is well settled that a
 23 *Bivens* action will not lie against an agency of the federal

25 Townsend, 224 F.3d at 26 n.2 (“[t]he district court correctly
 26 construed plaintiffs’ § 1983 claim as a *Bivens* claim because the
 defendants were federal, not state, agents.”)

1 CIVIL NO. 06-1517 (RLA)

15

2 government. The same holds true as to federal officials sued in their
3 official capacities. A *Bivens* action only may be brought against
4 federal officials in their individual capacities. Even then, the
5 plaintiff must state a claim for direct rather than vicarious
6 liability; respondeat superior is not a viable theory of *Bivens*."
7 Ruiz Rivera v. Riley, 209 F.3d 24, 28 (1st Cir. 2000) (internal
8 citations omitted).

9 There is no such animal as a *Bivens* suit against a
10 public official tortfeasor in his or her official capacity.
11 Instead, any action that charges such an official with
12 wrongdoing while operating in his or her official capacity
13 as a Untied States agent operates as a claim against the
14 United States. Because a *Bivens* claim may not be brought
15 directly against the United States as such, an official
16 capacity *Bivens* suit would be an oxymoron.

17 Perez Olivo, 384 F.Supp.2d at 543 (internal citations and quotation
18 marks omitted).

19 Lastly, similar to sec. 1983 suits, *Bivens* claims are subject to
20 the one-year limitations period applicable to personal injury torts
21 as provided for in P.R. Laws Ann. tit. 31, § 5298(2) (1991). See,
22 Gonzalez Rucci v. U.S. I.N.S., 405 F.3d 45, 48 (1st Cir. 2005); Roman
23 v. Townsend, 224 F.3d 24, 29 (1st Cir. 2000); Pitts v. United States,
24 109 F.3d 832, 834 (1st Cir. 1997).

25 Thus, unless specifically waived, sovereign immunity bars suits
26 brought against those employed by United States in their official

1 CIVIL NO. 06-1517 (RLA)

2 Page 16

3 capacity. Apart from the FTCA - which is strictly limited to the
4 United States as sole defendant - no other grounds for government
5 liability appear in the complaint. Accordingly, plaintiffs are
6 precluded in this case from asserting claims against the named
7 defendants in their official capacity and any such claims are hereby
DISMISSED.

8 All that remains for the court to ascertain is whether or not
9 plaintiffs have adequately pled a viable constitutional violation
10 against the individual defendants in their personal capacity. In
11 other words, plaintiffs' sole remedy for their Fourth Amendment
12 claims may only be prosecuted against the individual defendants under
13 *Bivens*.

14 **V. FTCA - PRIVACY CLAIM UNDER PUERTO RICO CONSTITUTION**

15 As part of the FTCA's jurisdictional requirements, sec. 1346(b)
16 limits liability to those situations in which "a private person would
17 be liable... in accordance with the law of the place where the act or
18 omission took place." The events leading to this litigation took
19 place in Puerto Rico. Thus, plaintiffs must identify the legal basis
20 for a private party to be liable in this forum based on the charged
21 acts or omissions. In this vein, it is important to note that
22 liability is limited to the acts or omissions of a private party in
23 like circumstances.

24 The search for analogous state-law liability is
25 circumscribed by the explicit language of the FTCA, which
26

1 CIVIL NO. 06-1517 (RLA)

Page 17

2 restricts that search to *private* liability. In other words,
3 we must look to some relationship between the governmental
4 employee and the plaintiff to which state law would attach
5 a duty of care in purely private circumstances.

6 The flip side of this coin is that we are not at
7 liberty to derive analogues from instances in which state
8 law enforcement officers - and only state law enforcement
9 officers - would be liable under state law. In the FTCA
10 milieu, the federal government does not yield its immunity
11 with respect to obligations that are peculiar to
12 governments or official-capacity state actors and which
13 have no private counterpart in state law.

14 McCloskey, 446 F.3d at 267 (italics in original, internal citations,
15 brackets and quotation marks omitted).

16 In sum, it is plaintiffs' burden to show that under Puerto Rico
17 law a private employer who carried out surreptitious video
18 surveillance of its employees may be liable under tort principles.

19 In discussing FTCA liability in their Response in Opposition to
20 Defendants' Motion to Dismiss (docket No. 36), plaintiffs
21 indistinctly refer to rights protected under the U.S. Constitution
22 and those protected under the P.R. Constitution.⁸ However, because of

24 ⁸ See i.e., Part IV entitled "Plaintiffs' Claim for Damages for
25 the violation of the Fourth and Fifth Amendment of the **United States**
26 Constitution is Actionable under the FTCA" at p.9; "right of
privacy... under the Constitution of the **Commonwealth of Puerto Rico**
thus liable under the Federal Tort Claim[s] Act" at p.10, and "the

1 CIVIL NO. 06-1517 (RLA)

2 Page 18

3 the inherent legal implications under each one of them regarding the
4 proper party defendant to this litigation, i.e., United States under
5 the FTCA or individual liability of the named defendants, it is
6 crucial to distinguish claims between the two constitutional domains.

7 The Puerto Rico Supreme Court has specifically held that the
8 constitutional rights to dignity and privacy as they appear in art.
9 II secs. 1 and 8 of the Bill of Rights of the Puerto Rico
10 Constitution operate *ex proprio vigore* and therefore, may be asserted
11 against private parties via a claim sounding in tort pursuant to the
12 provisions of art. 1802 of the P.R. Civil Code, P.R. Laws Ann. tit.
13 31 § 5141 (1990) Vega-Rodriguez v. Telefonica de P.R., 156 D.P.R.
14 586, 600 (2002); Soc. de Gananciales v. Royal Bank de P.R., 145
15 D.P.R. 178, 2002 (1998); Arroyo v. Rattan Specialties, Inc., 117
16 D.P.R. 35, 64 (1986).

17 In other words, due to their peculiar nature by way of
18 exception, private parties are liable for violations to dignity and
19 privacy protections of their employees under our local Constitution.
20 The Puerto Rico Supreme Court distinguished coverage under these
21 particular constitutional rights which operate *ex proprio vigore* from
22 those that do require "state action" such as due process, freedom of
23 speech and protection against unreasonable searches and seizures
24 which mandate government intervention. Hence, these last provisions

25 claim brought... is based on violation of the Fourth and Fifth
26 Amendments of the **United States** Constitution" at p.10 (emphasis
ours).

1 CIVIL NO. 06-1517 (RLA)

19

2 are not available vis à vis private parties and may only be asserted
3 against government entities. Vega-Rodriguez, 156 D.P.R. at 613.⁹

4 That being the case, claims for violations to dignity and
5 privacy protections of employees brought under the Puerto Rico
6 Constitution translate into suits amenable to FTCA liability. Based
7 on the foregoing, this particular cause of action may only be
8 asserted against the United States under the FTCA. No such claim may
9 be brought against either the individual defendants or government
10 entities.

11 Accordingly, claims for alleged violations to dignity and
12 privacy protections under the Puerto Rico Constitution asserted
13 against the Secretary of Defense, the SJ-VAMC and the individual
14 defendants are hereby **DISMISSED**. These claims shall proceed
15 exclusively against the United States pursuant to the FTCA.

16 **VI. FTCA - HOSTILE WORK ENVIRONMENT CLAIM**

17 Defendants contend that there is no actionable hostile
18 environment claim under the FTCA. Plaintiffs counter by arguing that
19 they are not asserting a separate cause of action for hostile
20 environment but rather this phrase describes the damages ensued as a

22 ⁹ It is important to note that two parallel suits were filed by
23 employees affected by surveillance of their work facilities at the
24 Puerto Rico Telephone Company - one in federal court seeking relief
under federal constitutional provisions - Vega-Rodriguez v. Puerto
Rico Telephone Co., 110 F.3d 174 (1st Cir. 1997) - the other in state
25 court based on state constitutional and statutory provisions Vega-
Rodriguez v. Telefonica de P.R., 156 D.P.R. 586 (2002). Hence, each
26 of these suits examined the legal consequences of the same events
under the two separate legal schemes.

1 CIVIL NO. 06-1517 (RLA)

2 Page 20

3 result of the secret videotaping. Based on these representations,
4 this argument has been rendered **MOOT**.

5 **VII. FOURTH AMENDMENT**

6 In order to adequately dispose of plaintiffs' constitutional
7 challenge to the video surveillance we must initially address the
8 general principles surrounding the rights implicated under the facts
asserted in this case.

9 The Fourth Amendment to the United States Constitution protects
10 the "right of the people to be secure in their persons, houses,
11 papers, and effects, against unreasonable searches and seizures".
12 U.S. Const. amend. IV.

13 In order to ascertain whether or not a breach of the Fourth
14 Amendment has been effected, the court must initially determine
15 whether defendants "infringed an expectation of privacy that society
16 is prepared to consider reasonable." O'Connor v. Ortega, 480 U.S.
17 709, 715, 107 U.S. 1492, 94 L.Ed.2d 714 (1987) (citation and internal
18 quotation marks omitted).

19 "[A] privacy expectation must meet both subjective and objective
20 criteria: the complainant must have the actual expectation of
21 privacy, and that expectation must be one which society recognizes as
22 reasonable." Vega-Rodriguez, 110 F.3d at 178. In other words, "[a]
23 valid fourth amendment claim requires a subjective expectation of
24 privacy that is objectively reasonable." United States v. Taketa, 923
25 F.2d 665, 670 (9th Cir. 1991).
26

1 CIVIL NO. 06-1517 (RLA)

Page 21

2 "One has a subjective expectation of privacy if one has taken
 3 efforts to preserve something as private." Trujillo v. City of
 4 Ontario, 428 F.Supp.2d 1094, 1102 (C.D.Cal. 2006). "What a person
 5 knowingly exposes to the public, even in his own home or office, is
 6 not a subject of Fourth Amendment protection." O'Connor, 480 U.S. at
 7 718 (citation, internal quotation marks and brackets omitted). "The
 8 Fourth Amendment protects people, not places. What a person knowingly
 9 exposes to the public, even in his own home or office, is not a
 10 subject of Fourth Amendment protection. But what he seeks to preserve
 11 as private, even in an area accessible to the public, may be
 12 constitutionally protected." Trujillo, 428 F.Supp.2d at 1102
 13 (citations omitted).

14 The Fourth Amendment protects from undue government intrusion¹⁰
 15 both in civil and criminal settings.¹¹ Fourth Amendment "safeguards
 16 individuals not only against the government *qua* law enforcer but also
 17 *qua* employer." Vega-Rodriguez, 110 F.3d at 179.

19 ¹⁰ It is axiomatic that the U.S. Constitution protects only
 20 against government action. Hence, the Fourth Amendment's protective
 21 shield extends solely to public, not private employees, in their work
 22 environment. See, Vega-Rodriguez, 110 F.3d at 178 (internal citations
 23 omitted) (defendant quasi-public corporation "is... a government
 24 actor subject to the suasion of the Fourth Amendment".)

25 ¹¹ It is important to note that government work-related searches
 26 for employee misconduct are governed by the "reasonableness" standard
 27 not by the probable cause requirement. "A search by a public employer
 28 for non investigatory, work-related purposes and for investigations
 29 of work-related misconduct, however, are judged by a reasonable
 30 cause, not a probable cause, standard." Trujillo, 428 F.Supp.2d at
 31 1108.

1 CIVIL NO. 06-1517 (RLA)

2 Page 22

3 However, "not everything that passes through the confines of the
4 business address can be considered part of the workplace context".
5 O'Connor, 480 U.S. at 716. "Individuals do not lose Fourth Amendment
6 rights merely because they work for the government instead of a
7 private employer." *Id.* at 717. "Searches and seizures by government
8 employers or supervisors of the private property of their employees,
9 therefore, are subject to the restraints of the Fourth Amendment."
Id. at 715.

10 The Fourth Amendment's cloak extends solely to those work areas
11 where employees have a "reasonable expectation of privacy." O'Connor,
12 480 U.S. at 716. This determination is fact intensive and must be
13 made after careful examination of the circumstances extant in the
14 particular scenario under consideration. "Intrusions upon personal
15 privacy do not invariably implicate the Fourth Amendment. Rather,
16 such intrusions cross the constitutional line only if the challenged
17 conduct infringes upon some reasonable expectation of privacy." Vega-
18 Rodriguez, 110 F.3d at 178.

19 "In the last analysis, the objective component of an employee's
20 professed expectation of privacy must be assessed in the full context
21 of the particular employment relation." *Id.* at 179. "Whether an
22 employee has an objectively reasonable expectation of privacy in the
23 workplace is determined on a case-by-case basis." Williams v. City of
24 Tulsa, Okla., 393 F.Supp.2d 1124, 1129 (N.D. Okla. 2005). "Given the
25 great variety of work environments in the public sector, the question
26

1 CIVIL NO. 06-1517 (RLA)

2 Page 23

3 of whether an employee has a reasonable expectation of privacy must
4 be addressed on a case-by-case basis. O'Connor, 480 U.S. at 718.

5 "[I]t is necessary to examine all of the circumstances of the
6 working environment and the relevant search" in order to determine
7 whether the employee's privacy expectation in a particular location
8 is reasonable. Williams, 393 F.Supp.2d at 1129 (citation and internal
quotation marks omitted).

9 Because the reasonableness of an expectation of
10 privacy, as well as the appropriate standard for a search,
11 is understood to differ according to context, it is
12 essential first to delineate the boundaries of the
13 workplace context. The workplace includes those areas and
14 items that are related to work and are generally within the
15 employer's control. At a hospital, for example, the
16 hallways, cafeteria, offices, desks, and file cabinets,
17 among other areas, are all part of the work-place. These
18 areas remain part of the workplace context even if the
19 employee has placed personal items in them....

20 O'Connor, 480 U.S. at 715-16.

21 There is no "routinized checklist... capable of being applied
22 across the board and each case therefore must be judged according to
23 its own scenario." Vega-Rodriguez, 110 F.3d at 178.

24 "Although there is no "talisman" that determines whether society
25 will find a person's expectation of privacy reasonable, a court may

26

1 CIVIL NO. 06-1517 (RLA)

2 Page 24

3 consider (1) the nature of the search, (2) where the search takes
4 place, (3) the person's use of the place, (4) our societal
5 understanding that certain places deserve more protections than
6 others, and (5) the severity of the search." Trujillo, 428 F.Supp.2d
at 1103.

7 "The employee's expectation of privacy must be assessed in the
8 context of the employment relations. An office is seldom a private
9 enclave free from entry by supervisors, other employees, and business
10 and personal invitees. Instead, in many cases offices are continually
11 entered by fellow employees and other visitors during the workday...
12 for... work-related visits. Simply put, it is the nature of
13 government offices that others - such as fellow employees,
14 supervisors, consensual visitors, and the general public - may have
15 frequent access to an individual's office." O'Connor, 480 U.S. at
16 717. "[S]ome government offices may be so open to fellow employees or
17 the public that no expectation of privacy is reasonable." *Id.* at 718.

18 "That plaintiffs chose to perform these activities in an area
19 specifically designed to protect their privacy instead of a public
20 area establishes that they had taken measures to preserve these
21 activities as private." Trujillo, 428 F.Supp.2d at 1102. "Whether an
22 employee has an objectively reasonable expectation of privacy is an
23 easier question where an area is not enclosed, where the activities
24 can be easily observed, and where other personnel have easy access to
25 the area." Williams, 393 F.Supp.2d at 1129-30.

26

1 CIVIL NO. 06-1517 (RLA)

Page 25

2 Video surveillance in an employment setting may be regarded as
3 an unconstitutional search under the Fourth Amendment provided
4 plaintiff has a "reasonable expectation of privacy" in area subject
5 to view. However, the Fourth Amendment does not impose additional
6 special restrictions for reviewing the constitutionality of video
7 surveillance. "It is true... that human observation is less
8 implacable than video surveillance. But we find no principled basis
9 for assigning constitutional significance to that deprivation. Both
10 methods - human observation and video surveillance - perform the same
11 function. Thus, videotaping per se does not alter the constitutional
12 perspective in any material way. Vega-Rodriguez, 110 F.3d at 181 n.6.
13 "[N]o legitimate expectation of privacy exists in objects exposed to
14 plain view as long as the viewer's presence at the vantage point is
15 lawful. And the mere fact that the observation is accomplished by a
16 video camera rather than the naked eye, and recorded on film rather
17 than in a supervisor's memory does not transmogrify a
18 constitutionally innocent act into a constitutionally forbidden one."
19 *Id.* at 181 (internal citations omitted).

20 In Trujillo, 428 F.Supp.2d at 1104, the court ruled that despite
21 the communal nature of the locker room and the fact that plaintiffs
22 were subject to minimal intrusions it did "not diminish the
23 reasonableness of a person's expectation to be free from covert video
24 surveillance." "Plaintiffs need not have an expectation of total
25 privacy in order to have a reasonable expectation they will not be
26

1 CIVIL NO. 06-1517 (RLA)

1 Page 26

2 recorded surreptitiously while changing clothes in a locker room.
3 Privacy does not require solitude. Access of others does not defeat
4 people's expectation of privacy... [T]his diminished privacy interest
5 does not eliminate society's expectation to be protected from the
6 severe intrusion of having the government monitor private activities
7 through hidden video cameras." *Id.* at 1104-1105 (internal citations,
8 brackets and quotation marks omitted). See also, Taketa, 923 F.2d at
9 673 ("Privacy does not require solitude.")

10 **(A) Expectation of Privacy**

11 Defendants argue that plaintiffs had prior notice of the
12 possibility of cameras being installed in the locker-break room by
13 virtue of the VA Handbook as well as the Master Agreement with
14 plaintiffs' Union.

15 "Public employees' expectations of privacy... may be reduced by
16 virtue of actual office practices and procedures, or by legitimate
17 regulation." O'Connor, 480 U.S. at 717. "A person may have a privacy
18 interest in his office, not just in his personal effects, if he meets
19 the... test of a subjective expectation of privacy that is
20 objectively reasonable. This first part of the test has special
21 relevance in the employment context, as a valid regulation may defeat
22 an otherwise reasonable expectation of workplace privacy." Taketa,
23 923 F.2d at 672 (internal citations omitted).

24 However, contrary to Vega-Rodriguez, where specific notice was
25 given regarding the cameras that were indeed installed, the documents
26

1 CIVIL NO. 06-1517 (RLA)

2 Page 27

3 provided by defendants in support of their argument do not have this
4 effect. In Vega-Rodriguez, 110 F.3d at 180 the court noted that the
5 "employer acted overtly in establishing the video surveillance: PRTC
6 notified its work force in advance that video cameras would be
7 installed and disclosed the cameras' field of vision. Hence, the
8 affected workers were on clear notice from the outset that any
9 movements they might make and any objects they might display within
10 the work area would be exposed to the employer's sight." (footnote
omitted).

11 The VA Handbook 0730 merely restates the Fourth Amendment
12 standard. It reads:

13 j. **Search of Employee Workplaces.** The authority to
14 search Government furnished and assigned personal lockers
15 and office desks without a warrant will depend on whether
16 the employer retains the right to inspect these areas and
17 the employee's reasonable expectation of privacy.

18 Further, art. 47 of the VA's Master Agreement with plaintiffs'
19 Union simply states that surveillance might be conducted "for safety
20 and security reasons."

21 A surveillance camera was installed in the VA Police Service's
22 locker-break room which houses the lockers assigned to each police
23 officer to store their official equipment. These lockers are not
24 full-size lockers intended to store garments. Rather, they are half-
25 sized lockers intended for storing official equipment such as: belts,
26

1 CIVIL NO. 06-1517 (RLA)

2 Page 28

3 flashlights, handcuffs, etc. at the end of each police officer's tour
4 of duty since this equipment cannot be taken home.

5 Within the locker-break room there is a bathroom with its own
6 door as well as an "evidence room" which is a small enclosed space
7 used to hold evidence taken from detainees. This bathroom can also be
used by persons in the "holding cell" nearby.

8 The area serves as a multi-purpose room by both female and male
9 personnel to eat, reheat food or store their equipment in the
10 lockers, enter the bathroom or gain access to the evidence room. It
11 contains a table with four chairs which the employees use to eat
12 quick meals as well as a refrigerator and a telephone but no radio or
13 television nor a sofa or couch.

14 The locker-break room is intended for the use of all of the
15 employees under the Police Service. Employees from other services in
16 the SJ-VAMC are not authorized to use this room. Hence, the room has
17 a sign advising that it is for the use of "authorized employees
18 only". The locker-break room is not sound proof and conversations
19 held therein can be heard in the hallway.

20 Defendants contend that there is no reasonable privacy
21 expectancy under the circumstances present in this case. However,
22 despite defendants' proffer, we find that there is sufficient indicia
23 in the record that the locker-break room was intended to be used by
24 a limited group of people for activities intended to be carried out
25 outside the presence of the general public to meet both the

26

CIVIL NO. 06-1517 (RLA)

Page 29

subjective and objective requirements under the Fourth Amendment. The purpose of the room was inherently private. It was designated for a particular category of employees to safeguard their personal belongings and working instruments as well as to eat snacks.

Defendants argue that because the area was used by a large number of staff and persons kept in the holding cell would use the bathroom this rendered it unsuitable for privacy concerns. However, defendants do concede that some employees would use the room to put on their uniform shirts, uniform belts and gear.¹² According to plaintiffs' union representative, "[t]he female and males use this opportunity to fix their pants and tuck their shirts inside."¹³ Further, observations of the April 24, 2004 tape made by Pedro J. Rosado-Gomez for 12:12 indicate that a "P.O. appears, dropped his pants to put shirt up; P.O. puts shirt on and leaves the area".¹⁴

Further, plaintiffs submitted the Sworn Statement of plaintiff Antonio Falu Santos, a DVA Police Officer, who indicated that: "VA Officers use the room to have private conversations including discussing cases in which [they are] involve[d];¹⁵ some of the VA Officers "closed the doors and change[d] [their] clothes" upon

¹² Motion to Dismiss (docket No. 33) ¶ 15 pp. 4-5.

¹³ Memorandum from Richard Camacho to Dr. Rafael E. Ramirez dated May 24, 2004 (docket No. 33) Exh. 3.

¹⁴ Motion to Dismiss (docket No. 33) Exh. 7 p. 47.

¹⁵ Sworn Statement (docket No. 44) ¶ 4.

1 CIVIL NO. 06-1517 (RLA)

Page 30

2 arrival and prior to leaving work;¹⁶ and they used the "room to eat
3 privately or to rest" during their lunch break.¹⁷ Affiant further
4 noted that the area was private "since we write and store evidence
5 and private reports that are private [pursuant to] HIPAA and Veterans
6 Privacy Act when we intervened with plaintiffs."¹⁸

7 "[T]he conduct in a locker room is inherently more private than
8 that which takes place in a shared or private office." Trujillo, 428
9 F.Supp.2d at 1105. "Plaintiffs need not have an expectation of total
10 privacy in order to have a reasonable expectation they will not be
11 recorded surreptitiously while changing clothes in a locker room.
12 Privacy does not require solitude. Access of others does not defeat
13 people's expectation of privacy... [T]his diminished privacy interest
14 does not eliminate society's expectation to be protected from the
15 severe intrusion of having the government monitor private activities
16 through hidden video cameras." *Id.* at 1104-1105 (internal citations,
17 brackets and quotation marks omitted). See also, Taketa, 923 F.2d at
18 673 ("Privacy does not require solitude.")

19 Thus, the fact that plaintiffs may have been seen by co-workers
20 present at the time in a locker-break room setting does not
21 automatically dispel their expectation of privacy view by third
22 parties via a hidden camera.

24 ¹⁶ Sworn Statement (docket No. 44) ¶ 5.

25 ¹⁷ Sworn Statement (docket No. 44) ¶ 6.

26 ¹⁸ Sworn Statement (docket No. 44) ¶ 7.

2 Based on these circumstances, with the evidence currently in
3 record no reasonable jury could find that plaintiffs did not have a
4 reasonable expectation of being free from covert video surveillance
5 while in the locker-break room.

6 **(B) Reasonableness of Search**

7 However, it is not enough for plaintiffs to establish the
8 reasonableness of their expectation of privacy. Given the underlying
9 purpose of the Fourth Amendment, i.e., protect against unreasonable
10 searches, in addition to asserting that the privacy expectations are
11 indeed reasonable, plaintiffs must also prove that the employer's
12 search was in fact unreasonable.

13 "The nature of the intrusion can affect whether a person has a
14 reasonable expectation of privacy; while a person may not have such
15 an expectation from one type of search, he or she objectively may
16 expect privacy with respect to another." Trujillo, 428 F.Supp.2d at
17 1103.

18 "The precise extent of an employee's expectation of privacy
19 often turns on the nature of an intended intrusion. In this instance
20 the nature of the intrusion strengthens the conclusion that no
21 reasonable expectation of privacy attends the work area. Employers
22 possess a legitimate interest in the efficient operation of the
23 workplace and one attribute of this interest is that supervisors may
24 monitor at will that which is in plain view within an open work
25 area." Vega-Rodriguez, 110 F.3d at 180 (internal citations omitted).
26

1 CIVIL NO. 06-1517 (RLA)

2 Page 32

3 In setting forth the applicable analysis for determining the
4 standard of reasonableness of searches in the workplace the Supreme
5 Court noted the need to balance "the nature and quality of the
6 intrusion on the individual's Fourth Amendment interests against the
7 importance of the governmental interests alleged to justify the
8 intrusion... In the case of searches conducted by a public employer,
9 we must balance the invasion of the employees' legitimate
10 expectations of privacy against the government's need for
11 supervision, control, and the efficient operation of the workplace."
12 O'Connor, 480 U.S. at 719-20 (internal citations and quotation marks
omitted).

13 "To determine the reasonableness of a search requires balancing
14 the nature of the quality of the intrusion on the individual's Fourth
15 Amendment interests against the importance of the government
16 interests alleged to justify the intrusion." Trujillo, 428 F.Supp.2d
17 at 1108 (internal citations, brackets and quotation marks omitted).

18 "[P]ublic employer intrusions on the constitutionally protected
19 privacy interests of government employees for noninvestigatory, work-
20 related purposes as well as for investigations of work-related
21 misconduct, should be judged by the standard of reasonableness under
22 all the circumstances. Under this reasonableness standard, both the
23 inception and the scope of the intrusion must be reasonable."
24 O'Connor, 480 U.S. at 725-26.

25

26

1 CIVIL NO. 06-1517 (RLA)

Page 33

2 Even though defendants argue that the surveillance video camera
3 was installed to address problems relative to "a rash of complaints
4 lodged by female police officers alleging sexual orientation
5 discrimination, sexual harassment, defamation and hostile work
6 environment",¹⁹ only evidence specifically pertaining to the
7 allegations of P.O. Raquel Rosario as well as defendants' responses
8 thereto were filed together with defendants' motion. Accordingly, we
9 shall disregard counsel's arguments relative to other complaints and
10 other Boards of Investigation.

11 According to the evidence submitted, a complaint was lodged by
12 female P.O. Raquel Rosario accusing a fellow police officer of sexual
13 harassment. She also alleged defamation, alleging that his unwanted
14 attentions and behavior were creating a hostile work environment. Ms.
15 Rosario addressed her written complaint to the Acting Operation
16 supervisor, Lt. Roberto Alonso, who then forwarded the complaint to
17 the Police Chief.

18 A Board of Investigation was convened by the SJ-VAMC Director to
19 address Ms. Rosario's complaint. A Report was issued on August 27,
20 2003, which concluded that P.O. Rosario was the object of unwelcome
21 advances by a fellow police officer but no evidence was found to
22 characterize the officer's behavior as sexual harassment. However,
23 the Board did find evidence of a hostile work environment and that
24 management failed to properly address the situation. The Board

25
26 ¹⁹ Motion to Dismiss (docket No. 33) p.9.

1 CIVIL NO. 06-1517 (RLA)

2 Page 34

3 recommended that management take action to improve the work
4 environment, including training and instructing supervisors about
5 sexual harassment.

6 On March 3, 2004, P.O. Raquel Rosario filed another complaint
7 alleging she was being harassed by someone who was placing notes in
8 her locker implying that she could be subjected to disciplinary
9 action for bringing a false accusation of sexual harassment against
10 a fellow police officer. The Police Chief then decided that a
11 surveillance camera should be installed in the Police Service locker-
break room.

12 A hollow was made in the ceiling and the camera was focused on
13 Raquel Rosario's locker. It was a video camera with a small fixed
14 lens in the middle, no audio, and a base to affix it to the surface.
15 The camera recorded continuously, not in segments, and the image was
16 transmitted from the camera to a video cassette. The camera recorded
17 live but the number of hours it recorded depended on the length of
18 the video cassette tape used.

19 The camera was installed in the locker-break room on or about
20 the first week of April 2004 by Detective Merido Aponte. On May 2,
21 2004, the camera was discovered by Sgt. Hector Rosario. It was taken
22 down the following day. No disciplinary or other administrative
23 actions were taken based on these tapes because no harassment or
24 other disciplinary violations were recorded.

25

26

2 In judging the reasonableness of the employer's conduct the
3 court must examine whether or not it was warranted due to the extant
4 circumstances and if so, whether its reach was sufficiently limited
5 to deal with the particular situation it sought to address.
6 "Determining the reasonableness of any search involves a twofold
7 inquiry: first, one must consider whether the action was justified at
8 its inception; second, one must determine whether the search as
9 actually conducted was reasonably related in scope to the
10 circumstances which justified the interference in the first place."
11 O'Connor, 480 U.S. at 726 (internal citations and quotation marks
12 omitted).

13 Defendants base their need for conducting covert surveillance in
14 this case on their interest in eradicating sexual harassment and
15 discrimination in the employment setting. Further, they argue that
16 previous steps to correct the problem had proven ineffective in
17 correcting the situation.

18 It is axiomatic that sexual harassment and discrimination
19 negatively affect the working environment. However, apart from the
20 fact that the documents submitted in this case pertain just to one
21 particular alleged victim - as opposed to the "rash of complaints by
22 female police officers" referred to by defendants - there is no
23 evidence in the record indicative that any of the alleged sexual
24 discriminatory conduct took place in the locker-break room. In other
25 words, there does not seem to be a logical connection between the
26

1 CIVIL NO. 06-1517 (RLA)

Page 36

2 conduct sought to be curtailed and the preventive measures taken. All
3 we have before us is reference to the two anonymous notes whose
4 content in no way manifest an impending danger situation.

5 Accordingly, faced with the limited information currently
6 available to the court it cannot be reasonably concluded that
7 defendants had a valid reason to have covert cameras installed in the
8 locker-break room. In other words, even though defendants have a
9 legitimate interest in eradicating sexual discrimination in the
10 workplace there is not sufficient evidence in the record at this time
11 to warrant encroachment into plaintiffs' privacy interests via
12 surveillance video.

13 Accordingly, defendants' request to dismiss the Fourth Amendment
14 claim is hereby **DENIED**.

15 **VIII. CONCLUSION**

16 Based on the foregoing, defendants' Motion to Dismiss (docket
17 No. 33)²⁰ is disposed of as follows:

- 18 - Any and all negligence claims asserted against the
19 Secretary of the Department of Defense, the SJ-VAMC and the
20 individual defendants are hereby **DISMISSED**;
21 - Any and all claims asserted against defendants in their
22 official capacity are hereby **DISMISSED**;

23
24
25
26 ²⁰ See, Response in Opposition (docket No. 36), Reply (docket
No. 39) and Surreply (docket No. 42).

1 CIVIL NO. 06-1517 (RLA)

Page 37

- 2 - Any and all privacy claims under the Puerto Rico
3 Constitution asserted against the Secretary of the
4 Department of Defense, the SJ-VAMC and the individual
5 defendants are hereby **DISMISSED**;
- 6 - The request to dismiss the hostile environment claim is
7 declared **MOOT**, and
- 8 - Defendants' request to dismiss the Fourth Amendment claim
9 is **DENIED**.

10 Judgment shall be entered accordingly.

11 IT IS SO ORDERED.

12 San Juan, Puerto Rico, this 19th day of March, 2008.

14 _____
15 S/Raymond L. Acosta
RAYMOND L. ACOSTA
United States District Judge